

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

DR. KEVIN RAY BUCKWALTER,

2:10-CV-108 JCM (LRL)

Plaintiff,

v.

KAY VAN WEY, et al.,

Defendants.

**ORDER**

Presently before the court is defendant Kay Van Wey's (hereinafter "Van Wey") motion to dismiss pursuant to rule 12(b)(6) (Doc. # 9). Plaintiff Dr. Kevin Ray Buckwalter (hereinafter "Buckwalter") filed an opposition (doc. # 15), and defendant Van Wey filed a reply (doc. #22).

In addition, defendant filed a special motion to dismiss pursuant to Nevada Revised Statute (hereinafter "N.R.S.") 41.660 (Doc. #6). Plaintiff Buckwalter filed an opposition (doc. #14), and defendant Van Wey filed a reply (doc. #21).

Also before the court is plaintiff Buckwalter's counter-motion to remand. (Doc. #17). Plaintiff filed an opposition (doc. #20), and defendant Buckwalter filed a reply (doc. #24).

On November 25, 2009, plaintiff Buckwalter filed a complaint against defendant Van Wey in Clark County District Court alleging three causes of action: (1) defamation; (2) defamation per se; and (3) intentional infliction of emotional distress (IIED). (Doc. #1). Defendant Van Wey removed this action to federal court invoking diversity jurisdiction pursuant to 28 U.S.C. § 1332. (Doc. #1).

This controversy arises out of numerous malpractice lawsuits against plaintiff Buckwalter.

1 Defendant Van Wey was an attorney for the alleged injured party in three different lawsuits against  
2 plaintiff Buckwalter. Its alleged that the claims against defendant Van Wey were the result of  
3 statements she made to a newspaper regarding defendant Buckwalter's alleged malpractice.

4 I. Motion to Remand

5 Plaintiff Buckwalter's counter-motion to remand alleges that the amount in controversy  
6 requirement has not been satisfied. Federal district courts have "original jurisdiction" where there  
7 is diversity of citizenship between the parties and the amount in controversy exceeds \$75,000. *See*  
8 28 U.S.C. 1332(a). Punitive damages can be considered as adding to the amount in controversy.  
9 *Gibson v. Chrysler Corp.*, 261 F.3d 927, 945 (9<sup>th</sup> Cir. 2001).

10 To determine if the amount in controversy requirement has been met, the court must look to  
11 the value of the complaint on its face. *Singer v. State Farm Mutual Auto Inc. Co.*, 116 F.3d 373, 377  
12 (9<sup>th</sup> Cir. 1997). If the amount in controversy is uncertain, the requirement can be met if the amount  
13 is more likely than not greater than \$75,000. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404  
14 (9<sup>th</sup> Cir. 1996).

15 Each of the three claims alleged by Buckwalter seeks damages "in excess of \$10,000."  
16 Further, Buckwalter is requesting unspecified punitive damages. Although the amount in controversy  
17 is greater than \$30,000, the final amount, including total compensatory damages along with punitive  
18 damages, is uncertain. However, should defendant Buckwalter be granted the damages he seeks for  
19 suffering both a loss in standing in his medical practice, and severe emotional distress, it is more  
20 likely than not that the damages would surpass \$75,000. Therefore, the amount in controversy  
21 requirement is satisfied, and the motion to remand is denied.

22 II. Motion to dismiss (12(b)(6)

23 Plaintiff Van Wey's second motion to dismiss asserts that defendant Buckwalter's complaint  
24 fails to state a claim upon which relief can be granted. *See* Fed. R. Civ. Proc. 12(b)(6). A complaint  
25 that lacks a cognizable legal theory or states insufficient facts under a cognizable legal theory may  
26 be dismissed as a matter of law. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9<sup>th</sup>  
27 Cir.1984). The Supreme Court has held that a complaint's factual allegations must be sufficient "to  
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1 raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544  
 2 (2007). Thus, a plaintiff must plead more than conclusory allegations to show “plausible liability”  
 3 and avoid dismissal. *Id.* n.5. As explained below, plaintiff Buckwalter failed to plead more than  
 4 conclusory allegations.

5 A. Defamation claims

6 The elements of a defamation claim are as follows: (1) a false statement regarding  
 7 plaintiff; (2) published to a third party without privilege; (3) fault on the part of the  
 8 defendant; and (4) either per se defamation or resulting special harm. *Lubin v. Kunin*, 17  
 9 P.3d 422, 425 (Nev. 2001). One of the four types of per se defamation statements is  
 10 “imputing the person’s lack of fitness for trade, business, or profession.” *K-Mart Corporation*  
 11 *v. Washington*, 866 P.2d 274, 282 (Nev. 1993).

12 The complaint fails to provide enough facts regarding the defendant Van Wey’s defamatory  
 13 statements. Defamatory comments are only indirectly mentioned or not included at all in the  
 14 complaint, thus giving the defendant Van Wey and the court inadequate notice of the pertinent  
 15 controversy. Plaintiff Buckwalter’s accusations are conclusory and fail to state sufficient facts that  
 16 could constitute a plausible cause of action.

17 Attorneys enjoy an absolute immunity, or privilege, for comments made during  
 18 judicial proceedings. *See Circus Circus Hotels v. Witherspoon*, 99 Nev 56, 60 (Nev 1983). The  
 19 litigation immunity applies inside and outside the court room and need only be loosely  
 20 related to the legal matter. *See Clark County School Dist. v. Virtual Educ. Software Inc.*, 213  
 21 P.3d 496, 502 (Nev 2009). The immunity has been liberally applied in Nevada to enforce a  
 22 policy that promotes justice. *Fink v. Oshins*, 118 Nev 428, 433 (Nev 2002).

23 It can be gathered from the complaint that the statements alleged to be defamatory are closely  
 24 related to the legal proceedings involving plaintiff Buckwalter and defendant attorney Van Wey. As  
 25 such, the defendant Van Wey’s comments regarding Buckwalter’s medical practice are privileged.  
 26 Thus, the defamation and defamation per se claims are dismissed for failure to state a claim  
 27 upon which relief can be granted.  
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1                   B.     IIED claim

2           The elements of an IIED claim are (1) extreme and outrageous conduct with either  
3 the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff  
4 suffered severe or emotional distress, and (3) causation. *Miller v. Jones*, 970 P.2d 571, 577  
5 (1998). Plaintiff Buckwalter limited his complaint for IIED to a recitation of the elements necessary  
6 to constitute the cause of action. However, he does not factually plead the act or statement that is  
7 extreme and outrageous. Because the claim is limited to conclusory allegations, the IIED claim  
8 is also dismissed.

9                   III.    Special motion To dismiss (N.R.S. 41.660)

10          Defendant Van Wey's second motion to dismiss asserts the claim is barred by the Nevada  
11 anti-SLAPP statute, N.R.S. 41.660. The statute is predicated on protecting "good faith  
12 communication in furtherance of the right to petition . . . made in direct connection with  
13 an issue under consideration by a legislative, executive or judicial body . . ." Moreover, the  
14 statute only protects citizens who petition a government agency. *See* N.R.S. 41.637. As such, the  
15 statute does not apply to defendant Van Wey. The statements were alleged to have been made to a  
16 newspaper and thus not directly in furtherance of any judicial proceeding. Further, a government  
17 agency was not being petitioned. Therefore, N.R.S. 41.660 is not applicable, and the special motion  
18 is denied.

19          IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff Buckwalter's  
20 motion to remand (doc. #17), is DENIED.

21          IT IS FURTHER ORDERED, that defendant Van Wey's motion to dismiss (doc. # 9) is  
22 GRANTED. Plaintiff Buckwalter's complaint as to defendant Van Wey is dismissed, without  
23 prejudice.

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1 IT IS FURTHER ORDERED, that defendant Van Wey's special motion to dismiss (doc. #  
2 6) is DENIED.

3 DATED June 24, 2010.

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6 **UNITED STATES DISTRICT JUDGE**